IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.11.2007

C O R A M :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.33350 of 2007
and
M.P.No.1 of 2007

B.G.Plywood Industries (P) Ltd.
Rep.by its Managing Director,
Now at No.306, Sydenhams Road,
Choolai, Chennai-600 112. ... Petitioner

Vs.

1. The Commercial Tax Officer,
Ponneri Assessment Circle.

2. The Appellate Assistant Commissioner-V,
Commercial Taxes, Kancheepuram. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified mandamus as stated therein.
For Petitioner :: Mr.A.P.Srinivas

For Respondents :: Mr. R.Mahadevan, AGP (T)
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O R D E R

The petitioner has sought a writ of Certiorarified Mandamus to call for the entire records of the second respondent in A.P.No.108 of 1999 and quash the order passed therein, dated 04.12.2003 and consequently direct the second respondent to dispose of appeal in A.P.No.108 of 1999 on merits and in accordance with law after granting reasonable opportunity of being heard to the petitioner.

2. The case of the petitioner is as follows:-
The petitioner is a registered dealer on the files of the first respondent under the Tamil Nadu General Sales Tax Act, 1959 and dealing in Timbers and Plywoods. For the Assessment Year 1990-91, the petitioner reported a total and taxable turnover of Rs.65,13,540.65 and the assessment was completed by the first respondent vide order in TNGST 193005/90-91, dated 18.12.1992 determining the total and taxable turnover at Rs.85,44,953/- and Rs.66,24,953/-. An inspection was conducted by the Central Excise Authorities in the petitioner's place of business on 25.2.1991 and based on the documents and statements of witnesses, the Central Excise Authorities proposed assessment that the petitioner was manufacturing various quality of plywoods other than the declared one and selling the same as a low quality and thereby the petitioner has undervalued the goods. The proposals of the Central Excise Authorities were forwarded to the Income Tax Department and they also proposed a revision of assessment. The petitioner filed an appeal before the Commissioner of Central Excise and also before the Commissioner of Income Tax for the

assessment under the Income Tax Act. The appeal filed before the Commissioner of Central Excise was dismissed vide order in Original No.63/95, dated 03.8.1995 and the petitioner filed further appeal before the Central Excise Gold (Control) Appellate Tribunal (for short 'CEGAT'), Chennai. In the meantime, the Enforcement Wing inspected the place of business of the petitioner on 05.3.1996 after nearly five years from the end of the Assessment Year and on the basis of the proceedings issued by the Central Excise Authorities, dated 03.8.1995, the Commercial Tax Officer, Ponneri Assessment Circle, the first respondent herein, formulated proposals alleging that the petitioner has not accounted for certain transactions said to have been made under the Central Excise Act and that there was sales suppression under the TNGST Act. Since relevant documents have been taken away by the Central Excise Authorities, the petitioner sought for extension of two months' time for filing reply. Without granting further extension of time, the first respondent passed the Assessment Order as if the petitioner has nothing to offer by way of objections.

3. Aggrieved by the Assessment Order, dated 01.6.1998, the petitioner filed an appeal in A.P.No.108 of 1999 before the Appellate Assistant Commissioner (CT) V, Kancheepuram contending inter alia that the notice was barred by limitation as the revision of assessment order was passed after five years from the end of the assessment year and that when third party materials were relied on for the purpose of making the assessment, copies of the same ought to have been furnished to the petitioner so as to enable them to cross-examine the said witnesses.

4. When the appeal before the second respondent under the Sales Tax Act was pending consideration, the appeal filed by the petitioner under the Income Tax Act was allowed by the Commissioner of Income Tax (Appeals), vide order, dated 31.3.1998 holding inter alia that in view of the contradictory statements of the witnesses, no inference can be drawn solely based on their statements, and, therefore, the allegation that the petitioner manufactured various qualities of plywoods was also not proved. The petitioner further submitted that the appeal filed by them before the CEGAT was allowed on 13.3.2001, on the ground that there has been violation of the principles of natural justice and that the petitioner was not given adequate opportunity to cross-examine the witnesses. Be that as it may, in the appeal before the second respondent, the learned counsel for the petitioner vide his letter dated 16.9.2002 reported no instructions, as he was not in touch with the petitioner. The final summon issued by the second respondent on 10.11.2003 was also returned by the postal authorities with an endorsement that the premises remain closed. Therefore, when the appeal was taken up for final hearing on 01.12.2003, the petitioner was not aware of the same and, hence, they could not appear to defend the case. In the circumstances, the Appellate Assistant Commissioner-V, Commercial Taxes, Kancheepuram, the second respondent herein, dismissed the appeal exparte on 04.12.2003 by stating, "In the absence of the appellant's turning up before this forum either on their own or contesting through an authorised representative, I do not have any option except to conclude that there is no case for the petitioner". Aggrieved by the same, the petitioner has preferred this writ petition.

5. Mr.A.P.Srinivas, learned counsel appearing for the petitioner submitted that as per section 31-A(3) of the Tamil Nadu General Sales Tax Act, 1959 (for short, TNGST Act) read with Rule 27(5) of the Tamil Nadu General Sales Tax Rules, 1959 (for short, TNGST Rules), the petitioner is entitled to have a reasonable opportunity of being heard before deciding the appeal.

6. According to the learned counsel, Rule 52 of the TNGST Rules prescribe the manner and the mode of service. Pointing out the defect in the impugned order, he submitted that when the summons issued by the second respondent, dated 10.11.2003 was returned by the postal authorities, the procedure contemplated under Rule 52 ought to have been followed by the second respondent and in the absence of the same, it should be construed that service as contemplated under the provision has not been properly effected in the manner known to law and thereby the petitioner has not been given an opportunity of contesting the appeal.

7. Learned counsel for the petitioner further submitted that when the order passed by the Central Excise Authorities itself was set aside on appeal by CEGAT, in the light of the order of the Commissioner of Income Tax (Appeals), dated 31.3.1998, the Appellate Assistant Commissioner ought to have allowed the appeal filed by the petitioner. He further submitted that in so far as undervaluation is concerned, Section 12-A of the TNGST Act contemplates that before proceeding in a case of undervaluation, the first respondent is bound to conduct an enquiry as per Rule 18-C of the TNGST Rules and, therefore, there is an error apparent on the face of the record by resorting to revision of assessment under Section 16 of the TNGST Act. Therefore, learned counsel for the petitioner submitted that in the absence of any escapement of turnover and when the actual sales transactions were already accounted for, the impugned order of assessment under section 16 of the TNGST Act is without jurisdiction.

8. Mr.R.Mahadevan, learned Additional Government Pleader (Taxes) was put on notice and heard. He submitted that when the Assessing Officer had information to the effect that the petitioner had undervalued the goods, a pre-revision notice was issued to the petitioner and on the basis of the materials, total taxable turnover was arrived at, and tax and penalty were levied.
9. Referring to the impugned order of the appellate authority, learned Additional Government Pleader submitted that though the assessment relates to the period 1990-91 and more than 50 adjournments were granted, the petitioner was not willing to get along with the appeal and, therefore, final summons were sent to the learned counsel for the petitioner on two occasions. When the learned counsel for the petitioner, vide letter, dated 16.9.2002 reported no instructions, as he was not in touch with the petitioner, the appellate authority had caused a fresh service to the petitioner and that one Mr.Veeraraghavan, Accountant of the petitioner had sent a telegram on 03.1.2003 praying further time of 15 days. Even thereafter, two more summons were sent to the petitioner and finally, the summon dated 10.11.2003 was returned by the postal authorities with an endorsement that the premises remain closed. Referring to the effort taken by the department, as stated in the impugned order, learned Additional Government Pleader submitted that by taking more than 50 adjournments, the petitioner had successfully dragged on the appeal before the second respondent and, therefore, the contention of the petitioner that they are not given adequate opportunity is not tenable. As regards the contention of the petitioner that the decision of the Income Tax Authorities/Central Excise Authorities ought to have been considered by the second respondent, counsel for State submitted that in the absence of any materials/submissions placed before the appellate authority, the impugned order cannot be found fault with on merits.

10. As regards service of summons, learned Additional Government Pleader submitted that the petitioner having taken periodical adjournments on more than 50 occasions, ought to have taken steps to find out the date of next hearing and appear before the appellate authority with necessary materials. He further submitted that when the petitioner himself had protracted the proceedings, the second respondent cannot be found fault with for non-service of summons either in person or in the business premises as per Rule 52 of the TNGST Rules.

11. Heard the counsel appearing for the parties and perused the materials available on record.

12. The Assessing Officer, on a consideration of the materials, particularly, the statement of Shri Sivakumar Jindal, Prop.M/s.Gupta Transport Corporation and the documents said to have been recovered by the Central Excise Authorities, found that the petitioner had grossly undervalued the goods and issued bills for their supplies, as if the goods were sold by Tvl. BG and Sons and that no labour services were rendered to Tvl.Vijay Enterprises. The Assessing Officer came to the conclusion that the following transactions were unaccounted and treated them as suppressions under the Tamil Nadu General Sales Tax Act for the year 1990-91:-

1.Details of removal of veneers
without payment of duty during
the year 1991 ... Rs. 3,07,914/-

2.Value of money realised in
excess over the bills value
by adoption of under valuation
during 1991 ... Rs. 98,67,899/-

3.Local sales made to Tvl. Duoesty
madras and payments received by
cheque No.269444, dated 26.12.90
not billed and accounted for ... Rs. 49,820/-

Total unaccounted
Transactions Rs.1,02,25,663

The Assessing Officer came to the conclusion that there was total suppression of transactions to the tune of Rs.1,02,25,633/- and on revision, re-determined the total and taxable turnover under Section 16 of the TNGST Act at Rs.1,68,50,585/-.

13. Section 12-A of the TNGST Act contemplates that if the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sales or purchases of any goods, at prices which are abnormally low, compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgment on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment. Sub-section (2) of Section 12-A contemplates that the provisions of sub-sections (2) to (5) of Section 16 shall, as far as may be, apply to assessment or reassessment under sub-section (1) as they apply to the reassessment of escaped turnover under sub-section (1) of Section 16.

14. Rule 18-C of the TNGST Rules, 1959 contemplates that in making an assessment under Section 12-A, the Assessing Authority shall take into account such of the factors as may be relevant to the determination of the prevailing market price of the goods. A perusal of the revised assessment order dated 01.6.1998 amply demonstrates that the Assessing Officer has failed to hold an enquiry and failed to take into consideration the factors which are set out in Rule 18-C of the TNGST Rules to arrive at the undervaluation of the goods. The revised assessment order is only a reflection of the proceedings of the Central Excise Authorities. Though the petitioner has protracted the proceedings for a long period, the appellate authority ought to have considered as to whether the original authority, i.e., Assessing Officer had followed the procedure under section 12-A of the TNGST Act read with Rule 18-C of the TNGST Rules to arrive at the finding whether there was undervaluation of the goods. The appellate authority, applying the relevant provisions, has simply recorded, that the components of Rs.1,02,25,633/- are based on the documents from the side of the Assessing Officer, and confirmed the assessment, without going into the merits of the case. In view of the orders passed by the Commissioner of Income Tax (Appeals), Chennai, dated 31.3.1998 holding that there are contradictory statements made by the witnesses examined by the Central Excise Authorities, reliance placed on such statements, by the Assessing Officer to revise the taxable turnover, is not

proper. Therefore, in the interest of justice, the petitioner should be given an opportunity to place before the Appellate Tribunal, the orders passed by the CEGAT and the Commissioner of Income Tax (Appeals), Chennai in Appeal Nos.198 and 199/1997-98, dated 31.3.1998 to prove their case that there was no undervaluation. In so far as issue relating to removal of veneers without payment of duty, during the year 1991, local sales made to Tvl.Duoesty, Madras were not billed and accounted for and treated as suppression under the Tamil Nadu General Sales Tax Act for the year 1990-91, the petitioner shall pay a sum of Rs.50,000/- towards the tax element and on such payment, the appellate authority shall consider the issue afresh.

15. In these circumstances, the impugned order is set aside and the matter is remitted back to the appellate authority to dispose of the appeal in accordance with the statutory provisions, within a period of six weeks from the date of receipt of a copy of this order.

16. In the result, the writ petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

js 06.11.2007
Index :yes

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